80-652

No. ____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN T. BRADY & COMPANY,

Petitioner,

—against—

FORM-EZE SYSTEMS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Must the award of an arbitrator made in flagrant disregard of the doctrine of this Court enunciated in Priebe & Sons v. The United States, 322 U.S. 407 (prohibiting enforcement of penalty or "in terrorem" clauses as against public policy) be vacated pursuant to 9 U.S. Code, Section 10(d), as being in "Manifest Disregard" of the law and/or in clear excess of the arbitrator's powers (Wilko v. Swan, 346 U.S. 427); the facts upon which the award was based being as follows:

a) a rental contract between the parties for equipment having an agreed value of $394,025 also provided that for all items lost or returned in damaged condition, the Lessor should be liable both for the full current list price of such items, and $15,000 a month plus interest at 18% per annum (regardless of the number or value of such items) until payment in full should be

made, b) the Lessor claimed $67,548.75 as the value of such "lost" or damaged items, c) the arbitrator awarded $45,590 as the actual value of the claimed items plus an additional $90,000 plus interest, predicated upon the $15,000 a month penalty clause.

2. Does the failure of the Court of Appeals to apply the rule of "Manifest Disregard" in arbitration proceedings as enunciated by this Court in Wilko v. Swan, 346 U.S. 427, and as further applied by the Court of Appeals in Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corporation, 274 F.2d 805 at 808 (cert. denied 363 U.S.) (2nd Circuit) and in San Martine v. Saguenay, 293 F.2d 796, (9th Circuit) and in Herbert Sobel and Hertz, warner & Co., 469 F.2d 1211, (2nd Circuit), as well as the Court of Appeals of the State of New York in Garrity v. Stuart, 40 NY 2 354, require the granting of the instant application so that the most important Federal doctrine of "Manifest Disregard"

may be finally and clearly settled by this Court for the guidance of all Federal Courts in proceedings under the Federal Arbitration Act?

3. Does the failure of an arbitrator to apply the rule against enforcement of an obviously unlawful penalty clause under both applicable Federal and New York State law constitute a "Manifest Disregard" under 9 U.S.C. Section 10(d) and thus require the vacatur of the $90,000 penalty award?

4. Given the restrictions imposed upon her by 9 U.S.C. Section 10(d), did the arbitrator have the power and/or jurisdiction to make an award of a $90,000 penalty which, in fact, she imposed solely because Petitioner contested (properly) Respondent's initial claim of $67,548.75 (the sum of $15,000 per month being imposed for <u>each month</u> of the period that Petitioner refused to pay Respondent's inflated claim, up to

the time when the arbitrator made her award of a lesser amount)?

5. Is it a condition precedent to vacatur of a clearly illegal award that the arbitrator specifically label it as a "penalty" in so many words, or is it sufficient that the award is specifically based on what is incontestably a penalty clause in the contract?

6. Did the Court of Appeals have any right to speculate that the arbitrator's award might not be a penalty assessment even though the arbitrator based it on the penalty provision of the Contract or does simple justice require that the matter be remitted to the arbitrator so that a judgment could be rendered without speculation as to what the arbitrator considered to be the basis of the $90,000 award as was done in Matter of the Arbitration of Granite Worsted Mills, 25 NY 2 451.

7. Does paragraph 10 of the Contract,

which provides that if any provisions of the Contract are in conflict with any rule of law of any state in which such provisions may be sought to be enforced, then such provision shall be rendered null and void, mandate the vacatur of the $90,000 award in view of the rule of law in New York State, (a) that an arbitrator has no power nor jurisdiction to award penalty or punitive damages even where agreed to (Garrity v. Lyle Stuart, Inc., 40 NY 2 354) and in further view of the general New York State law that penalty provisions are unenforceable and against public policy (Truck Rent-A-Center v. Puritan, 41 NY 2 420)?

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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN T. BRADY & COMPANY

Petitioner,

-against-

FORM-EZE SYSTEMS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner John T. Brady & Company ("Brady"), respectfully prays that a writ of certiorari issue to review the judgment and opinion entered on June 19, 1980 by the United States Court of Appeals for the Second Circuit in this cause.

Opinions Below

The opinion of the Court of Appeals is reported at 623 F.2d 261. The opinion

of United States District Judge Thomas P. Griesa is not reported as of this date. The opinions of the Circuit Court and the District Court are printed in the appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals printed in the appendix attached hereto is dated June 19, 1980 and was entered on or about that date. A petition for a rehearing was duly filed and denied by order of the Court of Appeals, Second Circuit, on July 23, 1980. A copy of said order is printed in the appendix annexed hereto. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) & Rule 17§§ 1a & 1c of the Rules of the Supreme Court.

Statutes Involved

UNITED STATES CODE
TITLE 9
ARBITRATION

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud or undue means

(b) Where there was evident partiality or corruption, in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

ARBITRATION LAW
N.Y. STATE
C.P.L.R.

§7511. Vacating or modifying award.

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbi-

trate if the court finds the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

Statement of the Case

Petitioner was the general contractor for the Postal Service of the United States in connection with the construction of an extensive mail facility at the John F. Kennedy Airport, New York City. The project required a vast amount of unusual concrete installations in that the design of the structure comprised varied and complicated shapes and contours of poured-in-place concrete. It was accordingly necessary to utilize special types of moveable equipment which Respondent was in the business of renting. Approximately 30,000 separate pieces were rented which were to be put together to form 40 separate truss assemblies 105 feet long by 15 feet wide to be moved around the construction as required much in the same manner as a child uses the many pieces of an Erector set to assemble his toy machinery.

The rental contract is dated April 26, 1977 (R. 14a). The first page thereof

lists the value of all of the equipment to be $394,025. Rider A to the contract provided for a payment of $102,800 for a seven-month rental; and if more than the seven-month rental was required, every succeeding month's rental was to be at the rate of $15,000 per month (R. 16a). It should be noted that the charge of $102,800 for a seven-month rental calculates out to $14,685 per month or, in round figures, $15,000 per month, the exact same figure that is stipulated for the monthly rental beyond the seven-month period. The $15,000 figure, then, is clearly a rental figure intended to cover continued possession of all $394,025 worth of equipment. Yet, when the $15,000 charge is imposed by reason of Paragraph 5 of the contract, it is imposed regardless of the amount of material which is retained, lost or damaged. Thus, if the lessee were to retain, say, one hundred dollars worth of material, beyond the seven-month rental period, he would be required

to pay $15,000 a month for the privilege. Applied this way, as required by Paragraph 5 of the reverse side of the contract (R. 15a), the $15,000 is clearly a penalty. In the instant case, the effect was to charge petitioner a rental calculated on the basis of 100% of the equipment for retention of a mere 11% (i.e. $45,590 of the total of $394,025).

It is conceded that the rental of the equipment terminated on July 15, 1978. Respondent then contended that Brady failed to return certain of the items of equipment and/or damaged other items specified in the Rental Contract and claimed the value of the non-returned and/or damaged equipment to be $67,548.73 (R. 24a). Respondent also claimed that it was entitled to be paid the sum of $15,000 per month commencing July 15, 1978, the charge to continue until Brady paid for the aforementioned non-returned or damaged equipment (R. 19a). This claim was made by Respondent by reason of Para-

graph 5 on the reverse side of the Contract, reading as follows: (R. 15a)

> The leased equipment shall be at the sole risk of the Lessee from injury, loss or destruction. Lessee shall secure and maintain insurance on the leased equipment in a sum equal to the full value thereof (as stated on the face of the lease form FE-37), with Lessor named as loss payee, and shall furnish a certificate of such insurance to Lessor upon request by Lessor. Should it or any part thereof be lost or destroyed due to fire, alteration or modification, or be damaged by improper usage beyond reasonable wear and tear, whether with or without fault on the part of Lessee, Lessee shall pay to Lessor at the address shown on the face of this lease agreement, a sum equal to Lessor's current list price for the same, or similar equipment. The monthly rental for the total equipment shall continue until such time as this sum is paid. (Emphasis added)

The arbitrator ruled upon the two claims of Respondent as follows:

1. An award for the actual value of the non-returned and/or damaged equipment in the amount of $45,590.00 (R.24a).

2. In addition thereto, the arbi-

trator awarded Respondent the sum of $90,000 covering an alleged six-month period at the rate of $15,000 per month, being from July 15, 1978 (the date on which the rental was terminated) until January 14, 1979, with interest at the rate of 1½% per month from July 15, 1978 until November 21, 1978, which was the date of the Notice to arbitrate.

3. This application is limited to the award of the $90,000 plus interest.

The arbitrator's award of $45,590 for the alleged non-returned and/or damaged equipment was rendered on controverted and conflicting testimony of the parties as to what was or what was not returned or damaged. Petitioner realized that our courts will not review the findings of an arbitrator with respect to the $45,590 award, and accordingly, reluctantly accepted same and made no motion with respect to same. The arbitrator made the award of $90,000, stating that it covered "the eight-month period from July 15, 1978 until January 14, 1979

with interest at the agreed upon rate of 1½% per month from July 15, 1978 to November 21, 1978, the date of the agreement between the parties to arbitrate." Actually, the period from July 15, 1978 to January 14, 1979 is not an eight-month period, but a six-month period. There was no rhyme nor reason for the fixing of January 14, 1979 as the outside date, since the award has not been paid to the date hereof for reasons not here relevant. Furthermore, the arbitrary date for the fixing of interest of 1½% per month from July 15, 1978 to November 21, 1978 has no logical basis. The date of November 21, 1978 is not the date of the agreement between the parties to arbitrate as stated in the award. It is the date of the Respondent's notice demanding arbitration (R. 20a).

The matter came on before Mr. Justice Thomas P. Griesa, sitting in the Southern District on Petitioner's motion to vacate the $90,000 award and Respondent cross-moved to confirm same. His opinion does not state

whether the assessment or the provision upon which it is predicated constitutes a penalty or is contrary to public policy, but simply applies the provision of the contract as did the arbitrator (Appendix E).

Mr. Justice Griesa did state that there is language in the decisions indicating that an award can be overturned where the arbitrator has been guilty of a "manifest disregard of the law" but stated, "there is no basis for saying that the award constitutes a manifest disregard of the law making it invalid." (Appendix E)

The Court of Appeals' affirmance rests on the most narrow and implausible ground, i.e., the arbitrator did not specifically label the $90,000 award as "punitive", and that there was nothing in the award to indicate a genuine "intention" to make it "punitive", as if the provision on which the arbitrator based it could conceivably have any other purpose or intent.

The Appeals Court also said that the entire transcript of the arbitration proceeding was not made part of the record, and therefore, the Court said it had no basis to infer that the $90,000 award bore no relationship to withholding payment on a claim of $67,648.73, which the arbitrator found was valid only to the extent of $45,590. Thus, because Petitioner refused to pay a claim concededly found to be inflated by over 50%, the Petitioner was fined an additional $90,000. It is significant that Respondent did not demand arbitration until November 21, 1978 (R. 20a) and that the hearings were held on January 4th and 5th, 1979 (R. 6a) and decided March 14, 1979 (R. 26a), yet the six-month period for which the $90,000 was assessed was from July 15, 1978 to January 14, 1979. Why, nobody knows.

The basis for Federal jurisdiction in the Court of first instance was predicated upon a transaction involving commerce

between the States within the meaning of 9 U.S.C. § 1, and diversity of citizenship, the Petitioner being a citizen of New York State and the Respondent a citizen of New Mexico. The rental items in question were shipped from New Mexico to New York and after being used were returned to New Mexico.

POINT I

THE JUDGMENT OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF NOT ONLY THE SUPREME COURT OF THE UNITED STATES BUT OF OTHER COURTS OF APPEAL AS WELL AS THE HIGHEST STATE COURT OF LAST RESORT IN WHICH THE ARBITRATION PROCEEDINGS WERE HELD.

Two of the most important questions presented by this application are as follows:

1. Does Clause 5 of the Rental Contract, by its very terms, constitute a penalty in that it calls for an additional payment of $15,000 per month until a claim for money damages is paid (regardless of the amount of the claim or the amount finally found to be owing), and if it does constitute a penalty, is it unforceable at law?

2. If it is a penalty and therefore unenforceable at law, is it similarly unenforceable in an arbitration proceeding?

(1) Clause 5 of the Rental Contract is unenforceable at law.

It is submitted that the opinion of

the Court of Appeals is in direct conflict and disregard of both Federal and State Law on the subject. This very Court, in Priebe & Sons v. The United States, 332 U.S. 407, in considering a so-called liquidated damage clause, said at page 413:

> Under these circumstances this provision for 'liquidated damages' could not possibly be a reasonable forecast of just compensation for the damage caused by a breach of contract. It might, as respondent suggests have an in terrorem effect on encouraging prompt preparation fordelivery. But the argument is a tacit admission that the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance. It is well-settled contract law that courts do not give their imprimatur to such arrangements.

In the case at bar, Respondent had made a claim for $67,548.73. It obviously was grossly inflated since the arbitrator found the claim valid to the extent of $45,590. That the clause imposing the punitive assessment of $90,000 in addition

to the compensatory award of $45,590 was never intended as a clause calling for liquidated damages is best illustrated by the statement at page 8 of Respondent's attorneys brief submitted to the arbitrator, viz:

> As to both questions, the contract is a clear concise document, containing no ambiguities. It states that missing equipment is to be paid for by the lessee at the 'current list price' then maintained by Lessor and, further, that until all equipment is returned or until the said list price of the equipment is reimbursed to Lessor by lessee, monthly rentals shall continue to accrue to lessor at $15,000 per month. To stop the monthly rentals from accruing, Brady need only have placed the list price value of this equipment in an escrow account, or paid it 'into court'.

Apparently what Respondent was urging was security for payment. But that security was already avaliable since petitioner had filed a surety company bond with the United States under The Miller Act, insuring pay-

ment of all labor and material on the job. Yet, because the Petitioner had the temerity to contest a claim inflated by 50%, Petitioner has been assessed an additional $90,000 with interest at 18% thereon. Such a result is just monstrous. The Court of Appeals' action in allowing the award to stand is a complete miscarriage of justice which cries out for the intervention of this Court.

In Forster v. Oro Navigation Company, 128 Fed. Supp. 113, affd., 228 Fed.2d 319 (2nd Circuit) a strikingly similar case was before the Court. The case dealt with the defendant's failure to pay seamen their wages at the time of their discharge. The seamen claimed that a union agreement provided that each seaman was to receive an additional $10.00 per day until the wages were paid. In denying recovery, the Court said, at page 117:

> For a second cause of action it is alleged that plaintiff is entitled to $10 a day for each day payment of overtime wages was delayed, as provided by the agreement between the defendant and S.I.U., Art. II, Sec. 31. This is an agreement fixing alleged damages in advance of a breach, entirely unrelated to any reasonably anticipated damage. It provides for a penalty and not the liquidation of damages and accordingly is unenforceable. See Restatement of Contracts, revised edition, Sec. 776; Cf. United States v. LeRoy Dyal Co., 2 Cir., 186 F.2d 460, 461, certiorari denied 341 U.S. 926, 71 S. Ct. 797, 95 L. Ed. 1357.

That the $15,000 per month provision in the Rental Contract was plainly disproportionate to any conceivable failure to promptly pay the inflated claim is so clear as to admit of no dispute. As we have earlier pointed out, it bears no relation to the value of the materials retained either, as it is a flat charge imposed whether $100 worth of equipment is held or $300,000 worth, and, thus, is clearly a penalty.

In Truck Rent-A-Center v. Puritan, 41 NY2d 420, at 424, the Court had this to say, viz:

> ...A clause which provides for an amount plainly disproportionate to real damage is not intended to provide fair compensation but to secure performance by the compulsion of the very disproportion. A promisor would be compelled, out of fear of economic devastation, to continue performance and his promisee, in the event of default, would reap a windfall well above actual harm sustained. (Ward v. Hudson River Building Co., 125 NY 230, 234-235; 5 Williston, Contracts [3rd ed.], §776, p. 668.) As was stated eloquently long ago, to permit parties, in their unbridled discretion, to utilize penalties as damages, 'would lead to the most terrible oppression in pecuniary dealings'.

Respondent could have waited a year or more before instituting the arbitration proceeding for its claim of $67,548.73 and thus, there would have already accrued for a one year period a penalty assessment of $180,000, plus the number of months before the proper amount of the claim could be

determined by the arbitrator. The irrationality of applying such a provision is too self-evident for further comment. The irrationality per se demands that said provision must be considered as a punitive, In Terrorem clause, the application of which constitutes a "manifest disregard" of applicable law.

The District Court stated that the arbitrator's award of $90,000 was justified by a "reasonable interpretation" of the contract, stating: (Appendix p. 20a)

> In the present case, the arbitrator's award of $90,000 plus interest was justified by a reasonable interpretation of the contract. The contract can be read as meaning that, until such time as all the equipment or its monetary value is returned to Form-Eze, Brady will be liable for the monthly rental.

There is no interpretation involved. The last sentence of paragraph 5 of the contract clearly and concededly states the penalty for the non-returned and/or non-

payment most clearly and directly viz. (15A), "The monthly rental for the total equipment shall continue until such time as this sum is paid." The District Court rationale is most ironic for in the guise of alleged interpretation it spells out most clearly the punitive character of the clause in question. The question thus was never one of interpretation. Rather, it was and is simply a question of the legality and/or the enforceability of the quoted sentence of the contract. If it is a penalty provision, as it obviously is, then it is illegal and/or not enforceable. To enforce it constitutes a "Manifest Disregard" of the law for the very simple reason that the applicable law has been clearly ignored.

(2) Clause 5 is unenforceable in an Arbitration proceeding.

It may be said that Federal law is more liberal than New York State law in

permitting vacatur of an arbitration award by applying the doctrine of Manifest Disregard. Both the majority and dissenting opinions in Wilko v. Swan, 346 U.S. 427 (1953) recognize the force of that doctrine. Thus, at page 435, the majority opinion stated:

> Power to vacate an award is limited. While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act, that failure would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.'

At 432, the dissenting opinion, viz:

> Arbitrators may not disregard the law. Specifically they are, as Chief Judge Swan pointed out, 'bound to decide in accordance with the pro-

> visions of Section 12(2).' On this we are all agreed. It is suggested, however, that there is no effective way of assuring obedience by the arbitrators to the governing law. But since their failure to observe this law "would ... constitute grounds for vacating the award pursuant to Section 10 of the Federal Arbitration Act,' 201 F.2d 439, 445 appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award.

Wilko v. Swan (supra) was construed in Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corporation, 274 Fed.2d 805 at 808 (2nd Circuit) (cert. denied 363 U.S. 843) wherein the Court recognized the rule in the following passage:

> It is true that an award may be vacated where the arbitrators have 'exceeded their powers', 9 U.S.C. 10(d). Apparently relying upon this phrase, the Supreme Court in Wilko v. Swan, 346 U.S. 427, 436-437, 74 S. Ct. 182, 98 L.Ed. 168 suggested that

> an award may be vacated if in 'manifested disregard' of the law.

In San Martine v. Saguenay, 293 Fed. 2d 796, (9th Circuit), the Court went even further in enunciating the doctrine of Manifest Disregard stating at page 801 as follows:

> We apprehend that a manifest disregard of the law in the context of the language used in Wilko v. Swan, supra, might be present when arbitrators understand and correctly state the law, but proceed to disregard the same.***
>
> Similar manifest infidelity of what the arbitrators know to be the law, but deliberate disregard might well be regarded as the use of 'undue means' within the meaning of sub-division (a) of 9 U.S.C. §10, or amount to 'partiality' within the meaning of sub-division (b) thereof.

The doctrine of 'manifest disregard" has also been approved in the Matter of the Arbitration between Herbert Sobel and Hertz, Warner & Co., 469 F.2d 1211, (2nd Circuit) wherein the Court said at page 1214, viz:

> It is a truism that an arbitration award will not be vacated for a mistaken interpretation of law. See, e.g., Wilko v. Swan, supra, 346 U.S. at 436-437, 74 S. Ct. 182, 98 L.Ed. 168; Burchell v. Marsh, 58 U.S. (17 How.) 344, 349-350, 15 L.Ed. 96 (1855); Office of Supply, Government of the Republic of South Korea v. New York Navigation Co., 469 F.2d 377, 379-380 (2d Cir. 1972). But if the arbitrators simply ignore the applicable law, the literal application of a "manifest disregard" standard should presumably compel vacation of the award.

The arbitrator in our case was a former judge of the Court of Claims of the State of New York. It is therefore fair to assume that the arbitrator knew that penalty provisions were not enforceable and that she had no power to make an award of punitive damages. Her action awarding $90,000 plus interest at the rate of 18% per annum constituted a clear and "Manifest Disregard" of the law.

POINT II

PARAGRAPH 10TH OF THE CONTRACT REQUIRES THE CONCLUSION THAT THE PENALTY SENTENCE OF PARAGRAPH 5TH IS NULL AND VOID AND UNENFORCEABLE

Paragraph 10th of the Contract provides as follows: (15A)

> If any provisions of this agreement are in conflict with any statute or rule of law of any state or territory wherein such provisions may be sought to be enforceable, then such provisions shall be deemed null and void to the extent that they may conflict therewith, but without invalidating the remaining provisions hereof.

Under the specific rule enunciated by the Court of Appeals of the State of New York, in Garrity v. Lyle Stuart, Inc., 40 NY2d 354, an arbitrator has no jurisdiction to make an award of punitive or penalty damages. The New York Rule, as is the Federal Rule, is also definite that the Courts will not enforce penalty provisions bearing no relation to actual damages.

Clearly therefore, by the very provision of Paragraph 10th of the contract, so much of Section 5 as provides for the assessment of penalty damages is null and void. Inasmuch as the assessment made by the arbitrator was directly predicated on the last sentence of Paragraph 5th of the Contract, the award of $90,000 was clearly not only beyond the power of the Arbitrator, but in "Manifest Disregard" of the contract limitations and of the applicable law.

POINT III

THE COURT OF APPEALS IMPROPERLY HELD THAT THE ARBITRATOR WAS REQUIRED TO CHARACTERIZE THE $90,000 PENALTY AWARD AS A PENALTY EVEN THOUGH THE ARBITRATOR EXPRESSLY PREDICATED THE $90,000 AWARD ON THE PENALTY CLAUSE OF THE CONTRACT

What Petitioner refers to as the penalty clause is the part of Clause 5 of the Rental Contract which provides that if payment is not made for the non-returned or damaged equipment, then:

> The monthly rental for the total equipment shall continue until such time as this sum is paid.

The arbitrator made the $90,000 award specifically stating:

> Upon consideration of the liability of Respondent for payment to Claimant for unpaid rentals pursuant to Paragraph 5 of "Partial Terms and Conditions of Equipment Lease" of the aforesaid Agreement in the amount of $15,000 per month commencing on July 15, 1978 and continuing until all equipment has been returned or paid for pursuant to said Agreement,

> the sum of $90,000 shall be paid by Respondent to Claimant covering the eight-month period from July 15, 1978 until January 14, 1979, with interest at the agreed upon rate of 1½% per month from July 15, 1978 until November 21, 1978, the date of the Agreement between the parties to arbitrate.

The Circuit Court correctly held that under the ruling of the Court of Appeals of the State of New York in Garrity v. Stuart Inc., 40 NY2d 354, an arbitrator has no power to award punitive or penalty damages even if such damages have been agreed upon between the parties. The error of the Circuit Court, however, lies in its holding that since the arbitrator did not specifically characterize the $90,000 award as penalty damages, although the arbitrator specifically predicated the $90,000 award on the penalty clause of the Contract, the said $90,000 award cannot be held to be a penalty award. The justification for this almost incomprehensible reasoning is said to lie in the supposed distinction made in the case of

Board of Education v. Niagara-Wheatfield Teacher's Assoc., 46 NY2d 553. The Garrity case, however, is so apropos the case at bar that it is simply impossible to understand how the Circuit Court could have applied what it refers to as the "distinction" made in Niagara-Wheatfield (supra) and thus refuse to apply the clear holding of the Garrity case. It therefore become necessary to quote extensively from the Garrity opinion, wherein the Court stated at page 356 viz:

> Arbitrators generally are not bound by principles of substantive law or rules of evidence and thus error of law or fact will not justify vacature of an award (see Matter of Associated Teachers of Huntington v. Board of Educ., 33 NY2d. 229, 235 and cases cited). It is also true that arbitrators generally are free to fashion the remedy appropriate to the wrong, if they find one, but an authentic remedy is compensatory and measured by the harm caused and how it may be corrected (Matter of Staklinski (Pyramid Elec. Co.), 6 NY2d 159, 163; see Matter of Paver &

Wildfoerster (Catholic High School Assoc.), 38 NY2d. 669, 677, and cases cited)).

These broad principles are tolerable so long as arbitrators are not thereby empowered to ride rough-shod over strong policies in the law which control coercive private conduct and confine to the State and its courts the infliction of punitive sanctions on wrongdoers.

The court will vacate an award enforcing an illegal agreement or one violative of public policy (see Matter of Associated Teachers of Huntington v. Board of Educ. 33 NY2d. 299, 235-236, supra, and cases cited; Matter of Western Union Tel. Co. (Amer. Communications Assoc.), 299 NY 177, 187; Matter of East India Trading Co. (Halari), 280 App. Div. 420, 421, Affd 305 NY 866). Since enforcement of an award of punitive damages as a purely private remedy would violate public policy, an arbitrator's award which imposes punitive damages, even though agreed upon by the parties, should be vacated (Matter of Publishers' Assoc. of NY City (Newspaper Union), 280 App. Div. 600, 504-506, supra; Domke, Commercial Arbitration, §33.03; Fuchsberg, 9 NY Damages Law; §81, p. 61, n 9; 14 NY Jur., Damages, §184, p. 46; cf. Local 127, United

Shoe Workers of America v. Brooks Show Manufacturing Co. 298 F.2d 277, 278, 284).

The Circuit Court held that the Garrity doctrine was distinguished in the Wheatfield case in which the Court, in fact, considered an entirely different situation. In Wheatfield, a Teachers' Association filed a grievance petition on behalf of one of its members alleging that the defendant, Board of Education, had violated a collective bargaining agreement when it hired a guidance counselor from outside of the school district, rather than awarding it to Mr. Brown, one of the Association's members. The matter proceeded to arbitration and the arbitrator fixed the amount of Brown's damage at $1,500 without specifying the manner or mode of fixing such amount. The Court of Appeals of the State of New York held that merely because the award was not arrived at by precise mathematical computation, it was not thereby rendered punitive. The award was clearly compensatory.

The Court was, however, most careful to point out and adhere to its ruling in the Garrity case, stating at page 558, as follows:

> The present case is readily distinguishable from the situation in Garrity v. Lyle Stuart, Inc. (40 NY2d. 354, supra) which was relied on by the Appellate Division. In that case there was no problem computing compensatory damages, but in addition the arbitrator awarded punitive damages which were expressly labeled as such. We held on the facts in that case, that punitive damages may only be awarded by the State's courts. That holding should not be interpreted as an indication that whenever compensatory damages are somewhat speculative they are necessarily punitive.

In the case at bar, the arbitrator had no difficulty in finding the compensatory damages to be $45,590 but, just as in the Garrity case, the arbitrator made an additional award of $90,000 predicated directly on the penalty clause of the contract and in direct violation of the express holding in the Garrity case.

It was wholly unnecessary for the arbitrator to characterize the $90,000 award as punitive since the arbitrator directly predicated it on the penalty clause (Clause 5 of the Rental Contract), thus there were two awards -- one compensatory of $45,590 and the other penal in the sum of $90,000, plus interest at 18% per annum on the $90,000 award, directly within the condemnation of the Garrity Doctrine, even though the Court therein stated it was agreed upon by the parties. In the Wheatfield-Niagara case there was no penalty clause and there was only one award, a compensatory award.

The essence of Petitioner's grievance lies primarily in that part of the Court's Opinion which states the following (Appendix p. 109):

> Applying this language here we note that the arbitrator in the instant case did not label the $90,000 award as 'punitive' nor is there anything to indicate a genuine intention that the award be punitive. The Appellant has

> not made the transcript of the arbitration proceeding part of the record, so we have no basis to infer that the amount assessed for withholding payment for the damaged or lost equipment at issue here bore no relationship to the actual damage suffered by Form-Eze and was therefore punitive in nature.

To begin with, the arbitrator divided her award into two parts: one for compensatory damages in the amount of $45,590 for the lost and/or damaged equipment. Secondly, damages of $90,000 plus 1½% per month on the $90,000, with only 6% on the compensatory damages of $45,590, which in and of itself denotes the penal nature, if not the viciousness, of the $90,000 award. Why only 6% per annum interest on the compensatory award and 18% on the penalty award if it was not to be punitive? While the arbitrator applied no label to the $90,000 award, she directly stated that it was "pursuant to Paragraph 5 of 'Partial Terms and Conditions of the Equipment Lease'." A

more obvious penalty clause could not be imagined. To say that the arbitrator's failure to label that award punitive somehow purges it of its punitive nature when it is directly based on the penalty clause, is to subvert equity and common sense to form of the most insubstantial sort. Yet, the Circuit Court justifies its affirmance on the assertion that there is nothing to indicate a genuine intention on the part of the arbitrator that the award be punitive because of her failure to say it is punitive. The very essence of Paragraph 5 of the lease makes it a punitive or a penalty clause within the condemnation of all authorities. Having expressly referred to Paragraph 5, there was no more need for her to label the $90,000 as punitive damages than to reiterate that right is right, or wrong is wrong. Clauses such as Paragraph 5 have been declared to be punitive as a matter of law and the Circuit Court erroneously speculated

that the Arbitrator meant something other than she said. The holding of the Court in City of New York v. B & M Ferry Company, 238 NY 52 at 56, is most pertinent.

> The tendency of the courts in doubtful cases is to favor the construction which makes the sum payable for breach of contract a penalty rather than liquidated damages, even where the parties have styled it liquidated damages rather than a penalty.

The rule is also aptly stated in Manhattan Syndicate v. Ryan, 14 NY App. Div.2d 323, wherein the Court stated at p. 327, as follows:

> Notably, that breach was a delay in the payment of money rents. In this context it is a relevant general rule that a failure to pay a sum of money due will rarely, if ever, justify a further sum, in excess of interest, to be paid by way of liquidated damages. On the contrary, such a requirement is likely to be condemned as a penal forfeiture which the law will not recognize (Caesar v. Rubinson, 147 NY 492, 497; Stimpson v. Minsker Realty Co., 177 App. Div. 536, 539; 14 NY Jur., Damages, §167).

If the Court of Appeals had any doubt on the subject, and in order to render elementary justice, it should have at least done what the New York Court of Appeals recently did in a somewhat similar arbitration matter, i.e., Matter of the Arbitration of Granite Worsted Mills, 25 NY2d. 451, where it appeared that the contract provided a formula for the computation of the buyer's damages which specifically excluded consequential damage. The award amounted to more than $3,700, whereas the total purchase price was only $984,000. The lower Appellate Court, in confirming the arbitrator's award, had indicated in its opinion that the arbitrator may have refused to apply the damage limitation clause because he found it to be unconscionable, but the opinion of the lower Appellate Court was concededly based on pure speculation since it was conceded that the bases for the award were unknown. The Court of Appeals held at p. 456-7.

> On a motion to vacate such an award, finding that the arbitrator has indeed refused to enforce such a clause cannot be made upon a record silent as to that question *** What is required, however, is that the award indicate that he has in fact deliberately and intentionally exercised that power so that judicial review can proceed without the need for speculation as to what has in fact occurred in the arbitrable tribunal. Since the award in this case is insufficient in this respect, it can only be concluded that the arbitrator has exceeded his powers in making it, and the order of the Appellate Division reversing that of Special Term and confirming the award should be reversed and the matter remitted to the arbitrator for further proceedings in accordance with this opinion.

The analogy to our case is most striking. In spite of the fact that the lease contains an obvious penalty clause (Paragraph 5 of the lease) which was directly applied in this case, the Circuit Court predicated its opinion on the failure of the arbitrator to label the award as puni-

tive and then goes on to say that the Appellant has not made the transcript of the arbitration proceedings part of the record so there is no basis to infer that the amount assessed for withholding payment bears no relationship to the actual damage suffered by Form-Eze and was therefore punitive in nature; and further, that there was no indication that the arbitrator intended the award to be punitive. In other words, although the arbitrator expressly states that the $90,000 award is predicated upon Paragraph 5 of the lease, the Court of Appeals held that there was no indication that the arbitrator intended that the award be punitive. Since the Arbitrator specifically referred to the penalty clause, it would be proper to say that there was no indication that she meant the $90,000 award to be anything <u>but</u> punitive. If it was her intent to make it anything but punitive, then Form-Eze should have pointed to any

part of the record which would justify such an argument. In fact, Form-Eze, at page 20 of its brief to the Circuit Court, stated:

> Brady argued strenuously in the District Court and in the arbitration proceeding that the contract provision in question constituted a 'penalty', the arbitrator after having heard all the evidence and arguments of counsel, rejected that argument, upheld and applied the contract provision, and simply construed the contract in a way that Brady disagrees with.

There was no room for construction of Paragraph 5 by the arbitrator. It was and is a penalty clause and thus unenforceable and against public policy. It is respectfully submitted that the least the Court of Appeals should have done under the circumstances was to send the matter back to the arbitrator to find out exactly what was the basis for the $90,000 award. Petitioner most respectfully submits that the Court of Appeals should never have affirmed an obvious penalty of over $90,000 on speculation as to the basis of the award, in derogation

of what the arbitrator actually stated in the award. If, as a matter of public policy, a penalty clause is not enforceable and the award is specifically based on such a clause (which it concededly is), it is error to speculate that the award may have been based on something else. We were not dealing with $10 or $100, but $90,000, more than most men can hope to amass in a lifetime. To allow an award of $90,000 to stand under the circumstances presented here is a callous and gross perversion of justice.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID MORGULAS
747 Third Avenue
New York, NY 10017
Attorney for Petitioner

Of Counsel:

M. CARL LEVINE, MORGULAS
& FOREMAN

APPENDIX

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of July, one thousand nine hundred and eighty.

Present: HON. WILLIAM H. MULLIGAN
Circuit Judge

HON. ADRIAN A. SPEARS

HON. ROBERT W. SWEET

District Judges

80-7072

In the Matter of the Arbitration between

FORM-EZE SYSTEMS, INC.,

Petitioner-Appellee

-against-

JOHN T. BRADY & COMPANY,

Respondent-Appellant

United States Court of Appeals

Filed Jul 23 1980

A. DANIEL FUSARO: Clerk

SECOND CIRCUIT

A petition for a rehearing having been filed herein by counsel for the appellant, John T. Brady & Co.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,

Clerk

By: Rolanne Henry

Deputy Clerk

UNITED STATES COURT OF APPEALS

For The

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of June one thousand nine hundred and eighty.

Present: HON. WILLIAM. H. MULLIGAN

Circuit Judge

HON. ADRIAN A. SPEARS

District Judge

HON. ROBERT W. SWEET

District Judge

In the Matter of the Application of

JOHN T. BRADY & COMPANY

Petitioner-Appellant

v.

FORM-EZE SYSTEMS, INC.,

Respondent-Appellee

for an Order Vacating, Modifying and Correcting an Arbitration Award pursuant to 9 U.S.C. Sections 10 and 11

In the Matter of the Arbitration between

FORM-EZE SYSTEMS, INC.

Petitioner-Appellee

v.

JOHN T. BRADY & COMPANY,

Respondent-Appellant

80-7072

United States Court of Appeals
Filed Jun 19 1980
A. Daniel Fusaro:Clerk
SECOND CIRCUIT
DOCKETED AS A JUDGMENT 80,0937
on 8/12/80

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,

Clerk

by: Arthur Heller,
Deputy Clerk

(A true copy,
A. Daniel Fusaro
By Rollane Henry, Clerk)

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1084—September Term, 1979

(Argued April 17, 1980 Decided June 19, 1980)

Docket No. 80-7072

In the Matter of the Application of

JOHN T. BRADY & COMPANY,

Petitioner-Appellant,

—against—

FORM-EZE SYSTEMS, INC.,

Respondent-Appellee.

for an Order Vacating, Modifying and Correcting an Arbitration Award pursuant to "9 U.S.C. Sections 10 and 11."

In the Matter of the Arbitration between

FORM-EZE SYSTEMS, INC.,

Petitioner-Appellee,

—against—

JOHN T. BRADY & COMPANY,

Respondent-Appellant.

3673

Before:

MULLIGAN, *Circuit Judge* and
SPEARS* and SWEET**, *District Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Hon. Thomas P. Griesa, Judge, confirming an arbitrator's award of approximately $140,000 in favor of Form-Eze against Brady resulting from breaches by Brady of an equipment lease.

Affirmed.

DAVID MORGULAS, New York, N.Y. (M. Carl Levine, Morgulas & Foreman, New York, N.Y., of counsel) *for Petitioner-Respondent-Appellant.*

STUART M. LEVINE, New York, N.Y. (Sachs, Montgomery, Pastore & Levine, New York, N.Y., of counsel) *for Respondent-Petitioner-Appellee.*

* United States District Judge for the Western District of Texas, sitting by designation.

** United States District Judge for the Southern District of New York, sitting by designation.

MULLIGAN, *Circuit Judge:*

Form-Eze Systems, Inc. ("Form-Eze"), a New Mexico corporation, is in the business of manufacturing, selling and leasing concrete forming equipment for use by contractors on building projects. John T. Brady & Company ("Brady"), a New York corporation, was the general contractor for the construction of a mail facility for the Postal Service of the United States at the John F. Kennedy Airport. On April 26, 1977, the parties entered into a contract whereby Form-Eze leased to Brady approximately $400,000 worth of concrete forming equipment for the Kennedy installation. Some 30,000 pieces of special types of moveable equipment were involved. A rental fee of $102,800 was fixed in the agreement for the first seven months of the lease, and $15,000 per month was agreed upon as the rental for each succeeding month. It is conceded that the rental agreement terminated on July 15, 1978. At that juncture, Form-Eze claimed that Brady failed to return certain pieces of equipment and had damaged others. The agreement contained an arbitration clause and Form-Eze gave its Notice of Intent to Arbitrate on November 21, 1978. Hearings were held in January 1979 and on March 14, 1979 the arbitrator awarded Form-Eze $45,590 in damages, which represented the value of the unreturned and damaged equipment. Brady does not contest this part of the award and that issue is not before us. However, the agreement provided further that if any of the equipment was lost or damaged, Brady became reponsible not only for its value, but "[t]he monthly rental for the total equipment shall continue until such time as this sum is paid." Applying this clause, the arbitrator awarded Form-Eze

the further sum of $90,000 in damages. This sum represented six months of rent ($15,000 per month from July 15, 1978 until January 14, 1979) plus interest at the rate of 1½% per month from July 15, 1978 until November 21, 1978. In an opinion dated December 27, 1979, Hon. Thomas P. Griesa, United States District Judge for the Southern District of New York, confirmed the award finding it to be justified by a reasonable interpretation of the contract. We affirm.

On this appeal, Brady argues that the clause of the rental agreement permitting Form-Eze to recover not only the value of the damaged or lost equipment, but the agreed monthly rental for all the leased equipment until such time as the value of the lost and damaged equipment was paid, constitutes a penalty clause and not merely a liquidated damages provision. This argument was concededly raised before the arbitrator, but was not specifically covered in his opinion.

It is well settled in New York that a clause in a contract providing for the payment of a fixed amount upon a breach of any provision in that contract, no matter how trivial the breach, cannot be sustained as a liquidated damages provision since it does not represent an estimate of prospective actual damages. Rather, such a clause is considered to be an unlawful penalty and is therefore unenforceable. *Lenco, Inc. v. Hirschfeld*, 247 N.Y. 44 (1928); *Seidlitz v. Auerbach*, 230 N.Y. 167 (1920); Restatement, Contracts § 339(1), Comment g. Brady argues here, as he did before the arbitrator, that the contract requirement that the lessee pay $15,000 per month, the amount which represented the rental for all the equipment leased, no matter how insignificant the damage to equipment or value of any

unreturned equipment might be, constitutes a penalty. Brady maintains that such a provision is contrary to the public policy of the State of New York, and is therefore an award beyond the powers of the arbitrator which must be vacated under the Federal Arbitration Act, 9 U.S.C. § 10(d).[1]

The appellant relies upon *Garrity v. Lyle Stuart, Inc.*, 40 N.Y. 2d 354, 356-57 (1976), where the New York Court of Appeals stated that "[s]ince enforcement of an award of punitive damages as a purely private remedy would violate public policy, an arbitrator's award which imposes punitive damages, even though agreed upon by the parties, should be vacated." (citations omitted). *Garrity* was a breach of contract case in which the arbitrator awarded not only compensatory damages, which were computed without difficulty, but punitive damages as well, expressly denominating them as such. No liquidated damage clause was involved in that case, and under familiar principles an award of punitive damages for breach of contract violated the public policy of the state. The case was distinguished however in a later Court of Appeals decision, *Board of Education v. Niagara-Wheatfield Teachers Ass'n*, 46 N.Y. 2d 553, 558 (1979), where the court noted:

> "In that case [*Garrity*], there was no problem computing compensatory damages, but in addition

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1 Section 10 of Title 9 provides that:

> the United States court in and for the district wherein the [arbitration] award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> • • • • •
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

> the arbitrator awarded punitive damages which were expressly labeled as such. We held on the facts in that case, that punitive damages may only be awarded by the State's courts. That holding should not be interpreted as an indication that whenever compensatory damages are somewhat speculative they are necessarily punitive (cf. *Matter of North Colonie Cent. School Dist. [North Colonie Teachers' Assn.],* 60 A.D. 2d 496, 401 N.Y.S.2d 874, affd. 46 N.Y.2d 965, 415 N.Y.S.2d 828, 389 N.E.2d 142). Ritualistic incantations of "punitive damages" will not suffice to vacate an arbitration award where discretion is used in the computation of damages. Only where the damages are genuinely intended to be punitive should the courts vacate the award. In all other cases 'it is the declared policy of this State to encourage "public employers and * * * employee organizations to agree upon procedures for resolving disputes"' (*Board of Educ. v. Associated Teachers of Huntington*, 30 N.Y.2d 122, 131, 331 N.Y.S.2d 17, 24, 282 N.E.2d 109, 114), and we should enforce the awards rendered by using those procedures where strong public policy is not violated."

Applying this language here we note that the arbitrator in the instant case did not label the $90,000 award as "punitive" nor is there anything to indicate a genuine intention that the award be punitive. The appellant has not made the transcript of the arbitration proceeding part of the record, so we have no basis to infer that the amount assessed for withholding payment for the damaged or lost equipment at issue

here bore no relationship to the actual damage suffered by Form-Eze and was therefore punitive in nature.

While the arbitrator's opinion does not discuss the public policy argument raised by the appellant, it is well established that arbitrators are not required to disclose the basis upon which their awards are made. *Kurt Orban Co. v. Angeles Metal Systems*, 573 F.2d 739, 740 (2d Cir. 1978). More to the point, however, there is no indication that the arbitrator intended the award to be punitive, and we are bound by the interpretation given to the instrument by the arbitrator so long as it is "barely colorable." *Andros Compania Maritima v. Marc Rich & Co., A.G.*, 579 F.2d 691, 704 (2d Cir. 1978). See also *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211 (2d Cir. 1972).

This court has generally refused to second guess an arbitrator's resolution of a contract dispute. "We have consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards '[w]here the arbitrators exceeded their powers,' 9 U.S.C. § 10(d). . . ." *Andros Compania Maritima v. Marc Rich & Co., A.G., supra*, 579 F.2d at 703. It is quite clear that the public policy of the State of New York as well as the practice of this court is to encourage the settlement of private disputes by consensual arbitration. See *Staklinski v. Pyramid Electric Co.*, 6 N.Y. 2d 159 (1959). The arbitrator did not characterize the award as punitive and under the circumstances set forth there is no basis on the record for us to assume that it was.

The judgment of the district court is therefore affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In the Matter of the Application of

JOHN T. BRADY & COMPANY,

Petitioner,

-against-

FORM-EZE SYSTEMS, INC.,

Respondent.

----------x

In the Matter of the Arbitration between

FORM-EZE SYSTEMS, INC.,

Petitioner.

-against-

JOHN T. BRADY & COMPANY,

Respondent.

----------x

JUDGMENT

79 Civ. 1690 - T.P.G.

79 Civ. 1778

U.S.DISTRICT COURT

Filed

JAN 4 1980

S. D. OF N. Y.

This action came on for hearing before the Court, Honorable Thomas P. Griesa, District Judge, presiding, and the issues having been duly heard, and a decision dated December 27, 1979 having been duly rendered,

It is Ordered and Adjudged

that the Award of Arbitrator dated March 14, 1979 is in all respects confirmed; and

It is further Ordered and Adjudged

that the motion of Petitioner-Respondent John T. Brady & Company to vacate or modify said Award of Arbitrator is denied and

It is further Ordered and Adjudged

that Respondent-Petitioner Form-Eze Systems, Inc. recover of the Petitioner-Respondent John T. Brady & Company

the sum of $141,260.00, plus interest thereon at the rate of 6% per annum as provided by law from the said date of the Award of Arbitration, March 14, 1979, to the date hereof in the amount of $6,873.36, resulting in a judgment in the total amount of $148,133.36, plus interest as provided by law from the date hereof.

Dated at New York, New York, this 4th day of January, 1980.

Raymond H. Burghardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application of

JOHN T. BRADY & COMPANY,

Petitioner,

v.

FORM-EZE SYSTEMS, INC.,

Respondent.

In the Matter of the Arbitration between

FORM-EZE SYSTEMS INC.,

Petitioner,

v.

JOHN T. BRADY & COMPANY,

Respondent.

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79 Civ. 1690 - Civ. 1778

GRIESA, J. Opinion

This is a petition by Form-Eze Systems Inc. to confirm an award of arbitration against John T. Brady & Company.

Brady has filed a cross-petition to vacate, modify and correct the award.

The petition of Form-Eze to confirm the award is granted. The cross-petition of Brady is denied.

Form-Eze rented concrete forming equipment to Brady under a contract dated April 26, 1977. The rental was to be for a lump sum of $102,800 for the seven-month period ending July 14, 1978, and at a rate of $15,000 per month for all succeeding months.

It is conceded that the rental terminated on July 15, 1978. The problem giving rise to the present litigation is that some of the equipment was not returned by Brady to Form-Eze, and some of the equipment was returned in damaged condition.

The contract of rental provided that, if any of the equipment was lost, or was destroyed or damaged due to various causes, Brady would pay Form-Eze the value of the lost, destroyed or damaged equipment. The contract further provided:

> "The monthly rental for the total equipment shall continue until such time as this sum is paid."

The controversy about the non-returned and damaged equipment was submitted to arbitration, with Form-Eze claiming that Brady was liable for the value of the equipment, and also for the monthly rental in the amount of $15,000 per month commencing July 15, 1978. These claims were made pursuant to the contract provision described above.

Form-Eze made a Notice of Intention to Arbitrate on November 21, 1978. Hearings before the arbitrator were held on January 4 and 5, 1979. On March 14,1979 the arbitrator made an award to Form-Eze, consisting of two parts: (1) $45,590 -- the value of the non-returned and damaged equipment: and (2) $90,000 -- monthly rental of $15,000 per month for the six months running from July 15, 1978 to January 14, 1979. The arbitrator awarded interest on the $90,000 at 1-1/2% per month from July 15, 1978 until November 21, 1978.

Brady does not challenge the $45,590 award, but does challenge the award of $90,000 plus interest. Brady's argument is that the award of $90,000 plus interest constitutes a penalty which the

arbitrator lacked authority to grant.

Brady relies upon 9 U.S.C. § 10(d), which provides that an arbitrator's award may be overturned in court where the arbitrators have "exceeded their powers."

It is settled law that a court should be reluctant to overturn an arbitrator's award. A court is not entitled to set aside an award because of an arbitrator's error of law, or because the court disagrees with the arbitrator's construction of a contractual provision. On the other hand, there is language in the decisions indicating that an award can be overturned where the arbitrator has been guilty of "manifest disregard of the law." Bell Aerospace Co. v. Local 516, 500 F.2d 921 (2d Cir.1974); Office of

Supply, Government of the Republic of Korea v. New York Navigation Co., Inc., 469 F. 2d 377 (2d Cir. 1972): Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corporation, 274 F.2d 805 (2d Cir.), cert. denied, 363 U.S. 843 (1960).

In the present case, the arbitrator's award of the $90,000 plus interest was justified by a reasonable interpretation of the contract. The contract can be read as meaning that, until such time as all the equipment or its monetary value is returned to Form-Eze, Brady will be liable for the monthly rental. Moreover, there is no basis for saying that the award constitutes a manifest disregard of the law, making it invalid.

The award is confirmed in all respects. The motion to vacate or modify it is denied.

So ordered.

Dated: New York, New York
December 27, 1979

Thomas P. Griesa

THOMAS P. GRIESA
U.S.D.J.

In the Matter of the Arbitration
Between

Form-Eze Systems, Inc.

and

John Z. Brady & Company

AWARD OF ARBITRATOR

CAROLINE K. SIMON, Arbitrator, having been chosen by the parties in accordance with the Agreement entered into by the above-named parties and dated April 26, 1977 and May 9, 1977, and having been duly sworn and having duly heard and considered the proofs and allegations of the parties and studied the proofs, the briefs, the reply briefs and the cited cases, AWARDS as follows:

1. Upon consideration of the claims for $67,548.75 made by Form-Eze Systems,

Inc., hereinafter referred to as Claimant, for non-returned equipment and damaged equipment in accordance with the terms of said Agreement, leased to JOHN Z. BRADY & COMPANY, hereinafter referred to as Respondent, Claimant pursuant to the said Agreement shall be paid the sum of $45,590.00 by the Respondent for such non-returned equipment and damaged equipment. This sum does not include the $2,500.00 for lumber, which sum the parties at the hearings agreed had been included in the March 3, 1978 settlement between the parties (pages 299,300 and 301 of the Hearing Minutes), but it does include $3,017.73 Claimant billed for damaged equipment, which sum Respondent conceded to be correct (page 193 of the Hearing Minutes), as well as the

$36,402.75 Respondent's proof accepted as due for lost equipment and other items (page 197 of the Hearing Minutes).

2. Upon consideration of the liability of Respondent for payment to claimant for unpaid rentals pursuant to Paragraph 5 of "Partial Terms and Conditions of Equipment Lease" of the aforesaid Agreement in the amount of $15,000.00 per month commencing on July 15, 1978 and continuing until all equipment has been returned or paid for pursuant to said Agreement, the sum of $90,000.00 shall be paid by Respondent to Claimant covering the 8-month period from July 15, 1978 until January 14, 1979, with interest at the agreed upon rate of 1-1/2% per month from July 15, 1978 until November 21, 1978, the date of the Agree-

ment between the parties to arbitrate.

3. After study of all proof on the claim by the Claimant for payment for additional damages incurred by Respondent on the project consisting of back charges from Respondent to Claimant of $37,500.00, lost rentals at the beginning of the project of $30,000.00, overrun of Claimant's build-up costs at the beginning of the project of $34,000.00, the proof adduced warrants the determination that the March 3, 1978 Agreement between the parties precludes any awards for these items and none, therefore, is made (page 21 and page 293 of the Hearing Minutes).

4. No proof having been presented on the affirmative defense, setoff, and counterclaim asserted by the Respondent,

the Arbitrator makes no ruling as to it except to determine that the equipment located by Respondent and heretofore examined by Claimant, and offered by Respondent in mitigation of damages and rejected by Claimant as unsuitable for its use cannot be substituted for acting in accordance with the terms of the Agreement into which the parties entered on April 26, 1977.

The counterclaim having been withdrawn by Respondent except for its request to permit the substitution of the equipment proffered by it requires no further ruling by the Arbitrator, and the Settlement Agreement dated March 3, 1978 continues its effect.

The compensation of the Arbitrator agreed upon at the rate of $500.00 a day

to be paid equally by the parties shall be $4,000.00. In accordance with their Agreement, each party shall pay $2,000.00 to the Arbitrator at 500 Fifth Avenue, New York, New York 10036.

This AWARD is in full settlement of all claims submitted to this Arbitration.

Dated: March 14, 1979

Caroline K. Simon
CAROLINE K. SIMON

Sworn to before me this
14th day of March, 1979.

Elizabeth Mabas
Notary Public

Elizabeth Mabas
Notary Public of the
State of New York